Public Bank Bhd v Siaw Sat Lin

HIGH COURT (SHAH ALAM) — SUIT NO MT4–22–1634 OF 1998
ZULKEFLI J
4 DECEMBER 2001

Banking *— Banker and customer — Overdraft account — Commitment fee payable on undrawn portion of overdraft facility — Whether defendant estopped from challenging plaintiff's right in charging commitment fee for duration of overdraft facility*

Banking *— Banker and customer — Overdraft account — Whether sums claimed by plaintiff wrongly computed — Formula purporting to calculate compound interest tendered by defendant — Whether defendant's formula should be applied — Whether would result in injustice to plaintiff*

Banking *— Securities for advances — Pledge — Shares deposited as security — Forced sale of pledged shares — Defendant not informed prior to sale of pledged shares — Whether incumbent on plaintiff to notify defendant prior to sale of pledged shares*

Banking *— Securities for advances — Pledge — Shares deposited as security — Forced sale of pledged shares — Whether plaintiff under obligation to wait for share prices to rise before disposing of pledged shares — Whether reasonable care had been taken by plaintiff to obtain true market value of pledged shares*

Banking *— Securities for advances — Pledge — Shares deposited as security — Non-stamping of MOD — Defendant had requested plaintiff not to stamp MOD — Whether defendant estopped from raising non-stamping of MOD as an issue — No power of attorney granted to plaintiff to sell pledged shares — Whether provisions in MOD sufficient to confer plaintiff with right to force sell pledged shares*

Civil Procedure *— Summary judgment — Appeal — Bank suing for moneys advanced under overdraft facility — Whether summary judgment should be entered against defendant — Whether defendant raised triable issue*

The plaintiff had granted an overdraft facility to the defendant. As security for the overdraft facility, the defendant executed, inter alia, various memorandum of deposit ('MOD') pursuant to which, public-listed shares were pledged in favour of the plaintiff. The defendant failed to conduct the overdraft facility in a satisfactory manner as provided in the plaintiff's letters of offer and as a result thereof, the plaintiff demanded for the repayment of the sum owing thereunder together with interest accrued thereon. The defendant failed to comply with the plaintiff's letter of demand. The plaintiff then sued the defendant and the senior assistant registrar ('the SAR') allowed the plaintiff's application to enter summary judgment against the defendant under O 14 of the Rules of the High Court 1980. The defendant appealed. The defendant claimed that from his defence and the affidavits filed, he had raised a number of triable issues, which would warrant the dismissal of the plaintiff's application for summary judgment. The issues raised by the defendant were, inter alia: (i) the defendant was not informed prior to the sale of the pledged shares;

(ii) two of the MOD were ineffective as they were not stamped; (iii) the plaintiff had acted unlawfully in selling the pledged shares as it was not empowered by a power of attorney to do so; (iv) the plaintiff was reckless or negligent in selling the pledged shares at a time when the prices of the shares were lowest; (v) the plaintiff had overcharged the defendant in respect of the commitment fees; and (vi) the sums claimed by the plaintiff were wrongly computed and to substantiate his allegation that sums claimed by the plaintiff were excessive and wrongly computed, the defendant had tendered a formula (exh 'SSL-6') purporting to calculate the compound interest.

Held, dismissing the appeal:

(1) The rights of the plaintiff to force sell the pledged shares were contained in the MOD and it was a term of the MOD that the plaintiff may sell the pledged shares at any time and in any manner as the plaintiff deemed fit without notice to the defendant. As such, it was not incumbent on the plaintiff to notify the defendant every time the plaintiff wished to exercise its rights to sell the shares pledged under the MOD. In any event, the defendant had, at all material times been notified regarding the force sale of the shares by virtue of the letters of demand and monthly statement of accounts issued to the defendant by the plaintiff and the contract vouchers issued to the defendant by PB Securities Sdn Bhd, a company involved in the disposal of the pledged shares. Therefore, this issue cannot be deemed a triable issue as the defendant had, at all material times, full knowledge of the particulars of the force sale of the pledged shares (see p 456E–G, 457C–F).

(2) The defendant had requested the plaintiff not to stamp the two MOD and had undertaken to pay any additional stamp duty or penalty thereon as and when the need arose for such payments. As such, the defendant was estopped from raising this issue. Therefore, if the court were to impound stamp duty for the unstamped MOD, the defendant should be ordered to bear the stamp duty for the same, including any penalty arising from late stamping (see pp 457I–458A, E).

(3) Although the defendant had not executed a power of attorney, the provisions in the MOD were explicit enough to confer the right upon the plaintiff to force sell the pledged shares (see p 459B).

(4) The plaintiff was never obligated, whether contractually or legally, to wait for the share prices to rise before disposing of the pledged shares. The only matter to be observed by a mortgagee in exercising the power of sale was that reasonable care be taken by him to obtain the true market value at the date of the sale. In the instant case, the plaintiff only resorted to force selling the pledged shares after the defendant had failed to repay the amount demanded and the sale of the shares pledged was done in the open

market at the Kuala Lumpur Stock Exchange. In the circumstances, the plaintiff had satisfied or discharged its duty to obtain the true market value for the pledged shares when the same were force sold (see pp 459F, 460A–D).

(5) The defendant had adduced no evidence to show that he was a person who possessed the special knowledge or expertise in the area of advance arithmetic for the purpose of establishing reliability in his computation as shown in exh SSL-6. Further, it was unclear whether the formula cited was the right formula for the purpose of calculating compound interest and what the variables therein meant. As a result of the numerous uncertainties arising from the figures utilized in the defendant's calculations, it was not unforeseeable that the end result of the defendant's calculations was different from that of the plaintiff's. As the defendant's formula disclosed much room for error, it should not be applied in the instant case, as the same would result in injustice against the plaintiff (see pp 463D, H, 464B).

(6) The plaintiff's letters of offer ('exh CYK-2') provided for the levy of interest by the plaintiff at the rate of 1.0% on the undrawn portion of the overdraft facility computed on a monthly basis. Since the overdraft facility afforded to the defendant had been extended to 30 June 1998, the plaintiff was justified in charging commitment fee for any undrawn portion of the overdraft facility during that period. Further, the charging of commitment fee had been agreed to by the defendant, as evidenced by exh CYK-2. Thus, the defendant was estopped from challenging the plaintiff's right in charging commitment fee for the duration of the overdraft facility (see p 464D–F).

(7) In the final analysis, the defendant had failed to raise any triable issues that would justify the reversal of the SAR's decision (see p 465D).

[Bahasa Malaysia summary

Plaintif telah memberikan satu kemudahan kewangan overdraf kepada defendan. Sebagai cagaran untuk kemudahan kewangan tersebut, defendan telah menyempurnakan, antara lain, beberapa deposit memoranda ('DM') di mana saham-saham senarai awam diberi jaminan kepada plaintif. Defendan gagal untuk menguruskan kemudahan overdraf tersebut dalam cara yang memuaskan sebagai mana yang diperuntukkan dalam surat tawaran plaintif dan akibatnya, plaintif telah menuntut bayaran balik jumlah yang terhutang berserta faedah yang tertunggak. Defendan gagal untuk mematuhi surat tuntutan plaintif. Plaintif kemudian telah menyaman defendan dan penolong kanan pendaftar ('PKP tersebut') telah membenarkan permohonan plaintif untuk memasuki penghakiman terus terhadap defendan di bawah A 14 Kaedah-Kaedah Mahkamah TInggi 1980.

Defendan telah merayu. Defendan menyatakan bahawa berdasarkan pembelaan beliau dan afidavit-afidavit yang telah difailkan, beliau telah menimbulkan beberapa persoalan yang perlu dibicarakan, yang mewarankan penolakan permohonan penghakiman terus plaintif. Persoalan-persoalan yang telah ditimbulkan oleh defendan adalah, antara lain: (i) defendan telah tidak dimaklumkan sebelum jualan saham-saham yang dijamin tersebut; (ii) dua dariapda DM tidak berkuatkuasa kerana tidak disetemkan; (iii) plaintif telah bertindak menyalahi undang-undang dalam menjual saham-saham yang dijamin tersebut kerana ia tidak diberi kuasa oleh surat kuasa wakil untuk berbuat demikian; (iv) plaintif bersikap melulu dan cuai dalam menjual saham-saham yang dijamin tersebut ketika harga saham berada di paras paling rendah; (v) plaintif telah mencaj defendan berlebihan berhubung yuran komitmen; dan (vi) jumlah yang dituntut oleh plaintif tersilap kira dan untuk mengukuhkan pengataan beliau bahawa jumlah yang dituntut oleh plaintif adalah melampau dan tersilap kira, defendan telah menenderkan satu formula (eksh 'SSl–6') bagi tujuan mengira faedah kompaun.

Diputuskan, menolak rayuan tersebut:

(1) Hak plaintif untuk menjual secara paksa saham-saham yang dijamin terkandung dalam DM dan adalah satu terma DM bahawa plaintif boleh menjual saham-saham yang dijamin tersebut pada bila-bila masa dan dalam apa cara yang difikirkan sesuai oleh plaintif tanpa notis kepada defendan. Oleh itu, bukan kewajipan plaintif untuk memaklumkan defendan setiap kali plaintif ingin menggunakan hak beliau untuk menjual saham-saham yang dijamin tersebut di bawah DM. Dalam apa keadaan pun, defendan telah, pada setiap masa matan dimaklumkan tentang jualan paksa saham-saham tersebut melalui surat-surat tuntutan dan penyata akaun bulanan yang diberikan kepada defendan oleh plaintif dan baucar-baucar kontrak yang diberikan kepada defendan oleh PB Securities Sdn Bhd, sebuah syarikat yang terlibat dalam jualan saham-saham yang dijamin tersebut. Oleh demikian, persoalan ini tidak boleh dianggap satu persoalan yang perlu dibicarakan kerana defendan telah, pada setiap masa matan, mempunyai pengetahuan penuh tentang butir-butir jualan paksa saham-saham yang dijamin tersebut (lihat ms 456E–G, 457C–F).

(2) Defendan telah memohon plaintif untuk tidak mensetemkan kedua-dua DM tersebut dan telah berjanji untuk membayar apa-apa duti setem atau penalti mengenainya semasa dan apabila keperluan tersebut timbul untuk pembayaran sedemikan. Oleh itu, defendan telah diestopkan daripada menimbulkan persoalan ini. Dengan itu, jika mahkamah mengimpaunkan duti setem untuk DM yang belum disetemkan, defendan sepatutnya diperintahkan untuk menanggung duti setem tersebut,

termasuklah apa-apa penalti yang timbul daripada kelewatan membayar duti setem (lihat ms 457I–458A, E).

(3) Walaupun defendan tidak menyempurnakan satu surat kuasa wakil, peruntukan-peruntukan dalam DM adalah sangat jelas untuk memberikan hak ke atas plaintif untuk menjual secara paksa saham-saham yang dijamin tersebut (lihat ms 459B).

(4) Plaintif tidak diwajibkan, sama ada secara kontraktual atau di sisi undang-undang, untuk menunggu harga saham naik sebelum menjual saham-saham yang dijamin tersebut. Satu perkara yang perlu diperhatikan oleh pemegang gadai janji dalam menggunakan kuasa jualan adalah sikap berhati-hati yang munasabah yang perlu diambil oleh beliau untuk memperoleh nilai pasaran sebenar pada tarikh jualan tersebut. Dalam kes sekarang ini, plaintif hanya mengambil jalan untuk menjual secara paksa saham-saham yang dijamin tersebut setelah defendan gagal untuk membayar balik jumlah yang dituntut dan jualan saham-saham yang dijamin tersebut telah dilakukan dalam pasaran terbuka di Bursa Saham Kuala Lumpur. Dalam keadaan ini, plaintif telah menunaikan atau melepaskan kewajipannya untuk memperoleh nilai pasaran sebenar saham-saham yang dijamin semasa penjualan paksa dilakukan (lihat ms 459F, 460A–D).

(5) Defendan tidak mengemukakan keterangan untuk menunjukkan bahawa beliau seorang yang memiliki pengetahuan khusus atau kepakaran dalam ilmu aritmetik bagi tujuan membuktikan kebolehpercayaan pengiraan beliau sebagai mana yang ditunjukkan dalam eksh 'SSL–6'. Tambahan pula, adalah tidak jelas sama ada formula yang dirujuk adalah formula yang betul bagi tujuan mengira kompaun faedah dan apakah maksud pemboleh ubah yang digunakan. Akibat daripada pelbagai ketidaktentuan yang timbul daripada angka-angka yang telah digunakan dalam pengiraan defendan, boleh diramalkan bahawa hasil akhir pengiraan defendan akan berbeza daripada plaintif. Memandangkan formula defendan mendedahkan banyak peluang untuk melakukan kesilapan, ia tidak patut digunakan dalam kes sekarang, kerana ini akan mengakibatkan ketidakadilan terhadap plaintif (lihat ms 463D, H, 464B).

(6) Surat-surat tawaran plaintif ('eskh CYK–2') memperuntukkan faedah levi oleh plaintif pada kadar 1% berdasarkan bahagian kemudahan overdraf yang tidak dikeluarkan yang telah dikira secara bulanan. Memandangkan kemudahan overdraf tersebut kepada defendan telah dilanjutkan sehingga 30 Jun 1998, plaintif mempunyai justifikasi yang kuat untuk mencajkan yuran komitmen untuk apa-apa bahagian kemudahan overdraf yang tidak dikeluarkan dalam tempoh tersebut. Tambahan pula, caj yuran komitmen telah dipersetujui oleh defendan, sebagai mana yang diterangkan oleh eskh CYK–2. Oleh itu, defendan telah diestopkan daripada mencabar hak plaintif untuk mencajkan

yuran komitmen bagi tempoh kemudahan overdraf tersebut (lihat ms 464D–F). A

(7) Dalam analisa terakhir ini, defendan telah gagal untuk menimbulkan apa-apa persoalan yang pelu dibicarakan yang boleh menjustifikasikan keterbalikan keputusan PKP tersebut (lihat ms 465D).] B

Notes

For cases on overdraft account, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1294–1296.

For cases on pledge, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1544–1549. C

For cases on appeal on summary judgment, see 2(3) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 5726–5775.

Cases referred to D

American Express International Banking Corp v Tan Loon Swan [1992] 1 MLJ 727 (refd)

Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd [1971] 2 All ER 633 (refd)

Hong Leong Finance Ltd v Datuk Mohd Salleh bin Yusof [1989] 2 MLJ 129 (refd) E

Keppel Finance Ltd v Phoon Ah Lek [1994] 3 MLJ 26 (refd)

Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors [1982] 1 MLJ 198 (refd)

Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662 (refd)

F

Legislation referred to

Rules of the High Court 1980 O 14

Stamp Ordinance 1949 s 52(1)(a)

Mohd Musa (*Iza Ng Yeoh & Kit*) for the plaintiff.

MF Ng (*KS Lam* with him) (*KS Lam & Co*) for the defendant. G

Zulkefli J: This is the defendant's appeal to the judge in chambers against the decision of the senior assistant registrar ('SAR') granting summary judgment against the defendant on an O 14 application filed by the plaintiff.

H

Facts of the of the case

The relevant facts relating to the plaintiff's claim against the defendant are as follows:

(i) The plaintiff granted an overdraft facility ('the overdraft facility') to the defendant, at the request of same, vide the following: I

(a) a letter of offer dated 25 July 1987 granting the overdraft facility to the limit of RM100,000 (exh CYK–1; p 1; encl (3))

(b) a letter of offer dated 4 January 1994 granting an increment to the limit of the overdraft facility by RM150,000 bring same to the new limit of RM250,000 (exh CYK–2; p 3; encl (3))

(c) a letter of offer dated 23 April 1994 granting an increment to the limit of the overdraft facility by RM750,000 bring same to the new limit of RM1,000,000 (exh CYK–2; p 6; encl (3))

(d) a letter of offer dated 17 February 1996 granting an increment to the limit of the overdraft facility by RM500,000 bring same to the new limit of RM1,500,000 (exh CYK–2; p 10; encl (3); and

(e) a letter of offer dated 11 March 1997 granting an increment to the limit of the overdraft facility by RM1,200,000 bring same to the new limit of RM2,700,000 (exh CYK–2; p 17; encl (3)).

(ii) As security for the overdraft facility, the defendant in favour of the plaintiff executed the following documents:

(a) a MOD dated 4 December 1993 (exh CYK–4; p 27; encl (3)).

(b) a MOD dated 7 January 1994 (exh CYK–4; p 30; encl (3)).

(c) a MOD dated 28 April 1994 (exh CYK–4; p 34; encl (3)).

(d) a Form 16A for a first legal charge against the property known as Lot No 2044, certificate of title No 6593, Mukim Ampangan, Daerah Seremban for the sum of RM1,200,000 (exh CYK–5; p 36; encl (3)).

(e) a Form 16A for a second legal charge against the property known as Lot No 2044, certificate of title No 6593, Mukim Ampangan, Daerah Seremban for the sum of RM400,000 (exh CYK–5; p 78; encl (3)).

(iii) As further security for the overdraft facility, a third party charge was executed by one Kee Lin Sdn Bhd, where the defendant is a director of, in favour of the plaintiff by way of a Form 16A over the following pieces of land for a sum of RM350,000:

(a) HS (M) 933–945, Lot 3430–3442 all in Mukim Triang Hilir, Negeri Sembilan; and

(b) HS (M) 603–615, Lot 3109–3121 all in Mukim Triang Hilir, Negeri Sembilan

(exh CYK–5; p 119; encl (3)).

(iv) As a result of the defendant's failure to conduct the overdraft facility in a satisfactory manner as provided for under the aforesaid letters of offer, the plaintiff vide their letter dated 2 July 1998 (exh CYK–10; encl (6)):

(a) informed the defendant that the overdraft facility had expired on 30 June 1998; and

(b) demanded for the repayment of the sum of RM2,408,930.56, as at 1 July 1998 together with interest accruing thereon.

(v) As shown in the monthly statement of accounts issued by the plaintiff to the defendant, as exhibited in exh 'CYK–12'; encl (9), there were

several deposits into the defendant's account thus reducing the outstanding sum under the overdraft facility.

(vi) Further, after the expiration of the overdraft facility, the plaintiff vide a letter from their solicitors, namely Messrs Iza Ng Yeoh & Kit, dated 16 September 1998 demanded for the sum of RM2,146,568.30, as at 6 September 1998 together with interest accruing thereon at 4.50% above the plaintiff's base lending rate of 9.05%pa (exh CYK–6; p 165; encl (3)). The said outstanding sum is as shown in the monthly statement of account for the period of 6 September 1998–6 October 1998 (exh CYK–7; p 166; encl (3)).

(vii) As at, 11 October 1998, the total sum outstanding under the overdraft facility is that of RM2,171,035.98, as shown in the monthly statement of account for the period of 6 October 1998–6 November 1998 (exh CYK–7; p 167; encl (3)).

Issues brought up by the defendant in his defence and affidavits

The defendant claimed that from his defence and affidavits filed he had raised a number of triable issues which would warrant the dismissal of the plaintiff's application for a summary judgment as follows:

The defendant contended that he was not informed prior to the sale of the shares pledged as security. The defendant also alleged that the particulars as to the sale of the shares pledged, namely the amount of proceeds and date of sale, were not brought to the attention of the defendant by the plaintiff.

It is my finding that the rights of the plaintiff to force sell the shares pledged by the defendant are as contained in the aforesaid MOD ('MOD'). It is a term of the said MOD that the plaintiff may at any time sell the shares pledged in any manner as they shall deem fit without notice to the defendant. The exact wordings of the said term are reproduced as follows:

> It shall be lawful for the bank at any time or times hereafter during the continuance of this security without any notice to or any further consent or concurrence by me to sell the mortgaged securities or any of them in such manner and upon such terms and conditions generally as they shall think fit and to apply the net proceeds any such sale in or towards the discharge of the moneys hereby secured.

In the light of the said term, it is therefore not incumbent on the plaintiff to notify the defendant every time the plaintiff wishes to exercise their rights to sell the shares pledged under the said MOD.

It is also my finding that the defendant was at all material times given whether directly or indirectly particulars regarding the force sale of the shares pledged as follows:

(a) It is the common practice for the plaintiff to first make a demand for the outstanding sum under the overdraft facility and simultaneously giving notice to the defendant that failure on their part to regularise the overdraft facility would result in the plaintiff taking steps to force

A sell the said pledged shares. An example of such notice is the letter dated 8 June 1998 from the plaintiff, which is exhibited as exh CYK–9; encl (6).

(b) after force selling part of the shares pledged, the plaintiff will issue another letter to the defendant demanding for the balance outstanding and giving notice to the defendant that the plaintiff will continue with force selling of the shares pledged if the balance is not paid within the stipulated period. An example of such notice is the letter dated 2 July 1998 from the plaintiff, which is exhibited as exh CYK–10; encl (6).

(c) Monthly statement of accounts are issued by the plaintiff to the defendant itemising deposits, including proceeds derived from such force-sale, paid into the defendant's account with the plaintiff for the purpose or reducing the outstanding balance.

(d) PB Securities Sdn Bhd, the company involved in the disposal of the pledged shares, issued contract vouchers to the defendant informing the same of the date of transaction, quantity of a particular share sold, sale price and amount of proceeds obtained. Example of such contract vouchers is exhibited as exh CYK–14.

(e) Further, after force-sale of the pledged shares, the defendant will be required to issue instructions to the plaintiff requesting release of the particular share certificates. Examples of such letters of instruction are exhibited as exh CYK–14 and exh CYK–13. These letters of instruction also states full particulars of the force-sale.

Based on the above findings the so called issues brought up by the defendant cannot be deemed to be triable issues as the defendant at all material times, had full knowledge of the particulars of the force-sale of the shares.

The defendant also contended that the various MODs executed by him were not stamped thus making it ineffective.

I find as a fact that not all the said MOD executed by the defendant in favour of the plaintiff were unstamped. Only two of the said MODs were unstamped, namely the following:

(a) the MOD dated 7 December 1993; and

(b) the MOD dated 7 January 1994.

Nevertheless, I find that the two MODs were only unstamped due to the written request of the defendant. This is clearly shown in the defendant's letters dated 7 December 1993 and 7 January 1994, collectively exhibited as exh CYK–8; encl (6).

The pertinent portions of the said letters from the defendant are extracted as follows:

Letter dated 7 December 1993

> In consideration of your consent to allow me to execute the memorandum of deposit in escrow, I hereby irrevocably and unconditionally undertake to bear

any additional stamp duty or penalty of such stamp duty payable as and when the need arises for such payment(s). A

I confirm that you have liberty to determine at your absolute discretion and without reference to me, the circumstance requiring the memorandum of deposit to be stamp with additional stamp duty and/or the penalty for such stamp duty.

Further to the abovementioned, I hereby irrevocably authorize you to debit any account maintained with you, the aforesaid additional stamp duty and penalty stamp duty for the memorandum of deposit. B

Letter dated 7 January 1994.

In consideration of your consent to allow me to execute the memorandum of deposit in escrow, I hereby irrevocably and unconditionally undertake to bear any additional stamp duty or penalty of such stamp duty payable as and when the need arises for such payment(s). C

I confirm that you have liberty to determine at your absolute discretion and without reference to me, the circumstance requiring the memorandum of deposit to be stamped and/or the penalty for such stamp duty. D

Further to the abovementioned, I hereby irrevocably authorise you to debit any account maintained which I may have with yourself having credit balances or otherwise, the aforesaid stamp duty and penalty stamp duty for the memorandum of deposit.

Since it was at the request of the defendant that the plaintiff did not stamp the said two MODs it is my view that the defendant should not be allowed to raise this issue. The defendant is estopped from raising this issue. E

On this issue of unstamped documents I would like to refer to the case of *American Express International Banking Corp v Tan Loon Swan* [1992] 1 MLJ 727. In that case the document, which was unstamped, was that of a guarantee executed as security for facilities granted by the plaintiff. The defendant in that case raised, as a triable issue, the fact that the said guarantee was unstamped and therefore not admissible. The Supreme Court held that although the guarantee document had not been stamped, the non-stamping of the document did not provide a triable issue. The court has power and responsibility to impound unstamped documents, if produced, and to admit them on payment of stamp duty or penalty, if any, under proviso (a) to s 52(1) of the Stamp Ordinance 1949. F G

In another case of *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198, on the issue of unstamped documents, the Federal Court at p 200 had this to say:

H

It is clear that under this section [s 52(1) of the Stamp Ordinance 1949], except for certain types of instrument, prohibition against the admissibility of an instrument on account of not being duly stamped is not an absolute prohibition but conditional on payment of a duty or a penalty, if any, under ss 43 and 47.

In the circumstances of this case, if the court were to impound stamp duty for the two said MODs then the defendant should be ordered to perform as they have irrevocably agreed, vide their letters dated 7 December 1993 and I

A 7 January 1994, to bear the stamp duty for the said two MODs, including any penalty arising from late stamping of the same.

The defendant alleged that the plaintiff had acted unlawfully in selling the shares pledged as the same was not empowered by a power of attorney to do so.

B Although it is conceded that no power of attorney was ever executed by the defendant it is my view that the provisions of the said MOD are explicit enough to confer the right upon the plaintiff to force sell the shares pledged by the defendant as security.

The provision in point is as follows (at pp 27, 30 and 34 of encl (3)):

C > It shall be lawful for the bank at any time or times hereafter during the continuance of this security without any notice to or any further consent or concurrence by me to sell the mortgaged securities or any of them in such manner and upon such terms and conditions generally as they shall think fit and to apply the net proceeds of any such sale in or towards the discharge of the moneys hereby secured.

D By virtue of the aforesaid provision, it is my finding that the defendant has unequivocally vide the said MOD granted the right to force sell to the plaintiff. As such, the defendant's aforesaid allegation is baseless.

The defendant also alleged that the plaintiff was reckless/negligent in selling the shares pledged on or about June and July 1999, when the share E prices were lowest.

As a matter of clarification, I find that the shares pledged were not sold in June and July 1999, as deposed in the defendant's affidavit in para 8 of encl (5), but were in fact disposed on June and July 1998, as stated in para 8(b) of encl (6) of the plaintiff's affidavit in reply to the defendant's F affidavit. Nevertheless, I am of the view that the plaintiff was never obligated, whether contractually or legally, to wait for the share prices to rise before disposing of the shares pledged by the defendant as security. Once again I wish to restate the relevant provision as found in the said MOD, as follows:

G > It shall be lawful for the bank at any time or times hereafter during the continuance of this security without any notice to or any further consent or concurrence by me to sell the mortgaged securities or any of them in such manner and upon such terms and conditions generally as they shall think fit and to apply the net proceeds any such sale in or towards the discharge of the moneys hereby secured.

H On this point I would like to refer to the case of *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd* [1971] 2 All ER 633 wherein his Lordship Salmon LJ, at p 643 had this to say:

> I will now turn to the law. It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses I to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes.

The only reservation to be observed by the mortgagee in exercising such power of sale is as stated by his Lordship Salmon LJ in the same case at p 644 as follows:

> Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale.

In our present case, the plaintiff only resorted to force selling the shares pledged in June and July 1998 because the defendant had failed to make repayment upon demand by the plaintiff as illustrated in the plaintiff's letters of demand dated 8 June 1998 and 2 July 1998, exhibited as exh CYK–9 and exh CYK–10 respectively in encl (6). Further, the sale of the said shares pledged were done in open market at the Kuala Lumpur Stock Exchange vide the securities firms of PB Securities Sdn Bhd and K & N Kenanga Bhd, as shown vide documents issued by the aforesaid securities firms exhibited as exh CYK–13 and exh CYK–14 in encl (9).

In the circumstance, I find that the plaintiff has satisfied or discharged their duty to obtain true market value for the said shares pledged when same were force sold.

The principles enunciated in *Cuckmere Brick Co Ltd*'s case has also been adopted and applied in Malaysia and Singapore vide the following cases:

(a) *Hong Leong Finance Ltd v Datuk Mohd Salleh bin Yusof* [1989] 2 MLJ 129;

(b) *Keppel Finance Ltd v Phoon Ah Lek* [1994] 3 MLJ 26; and

(c) *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 (CA).

The defendant further contends that 4,000 shares of Damansara Realty Bhd pledged as security were lost and unaccounted.

Having perused the relevant affidavits filed by both the plaintiff and the defendant and the documents exhibited it is my finding the defendant aforesaid contention is baseless. Based on para 26 of the defendant's affidavit in encl (5) read together with exh SSL–3 the apparent unaccounted shares of Damansara Realty Bhd bears the following certificate numbers:

(a) 0361080;

(b) 0361081;

(c) 0562632; and

(d) 0562717.

I find that the said 4,000 shares of Damansara Realty Bhd have already been accounted for when the plaintiff derived at the balance currently claimed against the defendant. As for the shares bearing the certificate numbers of 0361080 and 0361081 it can be seen that the defendant had instructed K & N Kenanga Bhd, where the defendant has a trading account, to dispose of the same on 20 April 1994. This is evident by the Delivery Order

dated 25 April 1994 and a letter dated 4 August 1999 from K & N Kenanga Bhd to the plaintiff, all of which have been exhibited as exh CYK–13 of encl (9).

K & N Kenanga Bhd vide their aforesaid letter informed the plaintiff that the said Damansara Realty Bhd shares were sold under the trading account of the defendant on 20 April 1994, as follows:

PARTICULARS

Contract No	Contract Date	Quantity	Certificate Nos
SS18339	20 April 1994	20,000	0355557 (1)
			0355568 / 578 (11)
			0361006 / 103 (8)
SS18340	20 April 1994	20,000	0361014 / 025 (22)
			031036 / 043 (8)
SS183441	20 April 1994	20,000	036104 / 063 (20)
SS18351	20 April 1994	20,000	0361064 / 083 (20)

Based on the said letter, it is clear that the shares bearing the certificate numbers of 0361080 and 0361081 had been sold on 20 April 1998 under the contract number of SS18351. Further the defendant vide the said delivery order dated 25 April 1994 requested that the plaintiff transfer the certificate of shares stated in the contract notes as listed in the delivery order, including Contract No SS18351, to K & N Kenanga Bhd for their further action.

As for the shares bearing the certificate numbers of 0562632 and 0562717, it can also been seen that the said shares have also been sold vide PB Securities Sdn Bhd and the defendant has been duly informed. It is clear from the statement of PB Securities Sdn Bhd, exhibited as exh CYK–14 of encl (9), that the said shares were sold as follows:

(a) the share bearing certificate number of 0562632 was sold on 24 June 1998 under the contract number S078303; and

(b) the share bearing certificate number of 0562717 was sold on 28 June 1998 under contract number S083887.

Further, the defendant had once again issued instruction to the plaintiff to release the certificates sold under the aforesaid sale contract, also exhibited as exh CYK–14 of encl (9).

Based on the above it is my considered view that the aforesaid issue does not tantamount to a triable issue.

The appellant contends that the respondent/plaintiff had terminated the overdraft facility without notice and prematurely in September 1997.

Based on the affidavits affirmed for and on behalf of the plaintiffs, I find that the aforesaid contention is untrue. Firstly, the overdraft facility was never terminated in September 1997. It is clear from the plaintiff's letter dated 19 January 1998, exhibited as exh CYK–3; p 25; encl (3), that the plaintiff had granted extension of the overdraft facility by the following wordings in the first paragraph of the said letter:

> We are pleased to advise that we have allowed extension of your overdraft facilities totalling RM2,700,000 subject to the following terms:

At item 5 of the said letter, it was clearly spelt out that the overdraft facility would expire on 30 June 1998. I would also like to refer to the bottom right hand corner of p 2 of the said letter where the defendant had signed acknowledging and accepting the additional terms contained therein.

Further, the plaintiff had vide their letter dated 2 July 1998, exhibited as exh CYK–10 of encl (6), notified the defendant that the overdraft facility had expired as of 30 June 1998 and, as at 1 July 1998, there is a sum of RM2,408,930.56 outstanding under overdraft facility.

On the aforesaid premise, it is clear that the defendant's contention is without merit and I find that the same was done with the intention to confuse or create issues where there is none.

The defendant contends that one Mr Yap and Mr Chong of the plaintiff's branch at Jalan Raja Chulan had on or about 30 April 1997 urged the defendant not to close the overdraft facility after same had reduced the outstanding balance to RM822.21.

Firstly, I find that as per para 7(a) of encl (7) and para 14 of encl (6), both Mr Yap and Mr Chong had denied the defendant's aforesaid contention. The defendant had further averred vide para 5 of encl (8) that as a result of the representations made by Mr Yap and Mr Chong, the defendant charged the following pieces of land as further securities:

(a) HS (M) 933–945, Lot 3430–3442 all in Mukim Triang Hilir, Negeri Sembilan; and

(b) HS (M) 603–615, Lot 3109 all in Mukim Triang Hilir, Negeri Sembilan.

(exh CYK–5; p 119; encl (3)).

On this point I find that the defendant is trying to confuse the facts related thereto. Although at 30 April 1997, the outstanding balance of the overdraft facility did show the sum of RM822.21, as depicted by the monthly statements issued by the plaintiff for the month of April 1997, exhibited as exh SSL–2 of encl (5), but same was not the ending balance for the said month. The ending balance for the said month is that of a debit balance of RM4,297.17, after taking into consideration the interest generated plus commitment fee as provided by the said letters of offer. Further, the additional securities were granted on or about 9 April 1998, as shown in the Form 16A exhibited as exh SSL–4 of encl (8). This is

A approximately a year after the alleged representation made by Mr Yap and Mr Chong.

It is my finding that the additional securities were not given as a result of the representations made by Mr Yap and Mr Chong. It was given so that the plaintiff will agree to an extension of the overdraft facility. This is clear upon reference to the plaintiff's letter dated 19 January 1998, exhibited as exh CYK–3; p 25; encl (3). The intention of the said letter was to convey the plaintiff's consent for an extension of the overdraft facility until 30 June 1998 subject to the defendant providing, inter alia, the said additional securities.

Wrong and excessive computations

The defendant also contended that there were wrong and excessive computations made by the plaintiff in relation to the sums claimed as indicated in the statement of accounts. On this point the defendant tendered a formulae purporting to calculate compound interest, as per exh SSL–6 of encl 11. However, I find that the defendant has adduced no evidence to show that he is a person who possesses the special knowledge or expertise in the area of advance arithmetic for the purpose of establishing reliability in his computation. It is even unclear whether the formulae cited is indeed the right formulae for the purpose of calculating compound interest and what the variables in the said formulae mean.

Further, the defendant has substituted the variable with figures without first clearly stating that the figures so substituted were indeed the exact and correct figures at the particular date. For example, the defendant has quoted, in his first calculation, the sum of RM2,288,813.90 as the sum outstanding as at 1 December 1997 and the plaintiff's base lending rate then applicable is that of 10.35%pa. The defendant had apparently plucked the said figures used in the said calculation from the monthly statement issued by the plaintiff dated 6 January 1998, as exhibited together with the said calculations as exh SSL–6 of encl 11. It is also noted that in the said monthly statement it is clearly stated on the top portion of the same, that the last statement issued was that of 6 December 1997. As such the figure of RM2,288,813.90, being the balance brought forward, would be the balance standing as at 6 December 1997. The defendant had failed to show that the balance outstanding as at 1 December 1997 was also that of RM2,288,813.90.

Further, the defendant has also failed to exhibit any evidential proof that the base lending rate of the plaintiff for the month of December 1997 was also that of 10.35%pa.

As a result of the numerous uncertainties arising from the figures utilised in the defendant's calculations it is not unforeseeable that the end result of the defendant's calculations is different from that of the plaintiff's. The same ambiguities or doubts are also true with regard to the second and third calculations of the defendant. Although the plaintiff had not replied to the defendant's affidavit in encl 11, it is clear that the existence of such ambiguities and uncertainties makes it unnecessary for the plaintiff to rebut

by way of an affidavit when the same can be pointed out during the hearing of the said plaintiff's application for summary judgment. I am of the view that although the learned counsel for the plaintiff is barred from averring new facts which are not contained in the affidavits of the plaintiff, he is however not barred from analyzing the evidence tendered by the defendant and presenting the result of his analysis to this court.

In the circumstances, it is my finding that based on the analysis and submission of the learned counsel for the plaintiff on the formulae tendered by the defendant for calculating the said compound interest, the said formulae would appear to be based on mere calculations of the defendant which discloses much room for error. It should not be applied in the instance case as it would result in injustice against the plaintiff.

Overcharging of commitment fees

The learned counsel of the defendant had also contended that there has been an overcharging of commitment fees made by the plaintiff as seen in the overdraft accounts. The letters of offer, exhibited as exh CYK–2 of encl 3, provides for the levy of interest by the plaintiff at the rate of 1.0% on the undrawn portion of the overdraft limit computed on a monthly basis.

I find that it is clear from the facts averred in the plaintiff's affidavits that the overdraft facility afforded to the defendant had been extended to 30 June 1998 vide the plaintiff's letter 19 January 1998, exhibited as exh CYK–10, encl 6. Since the overdraft facility was not terminated but was extended to 30 June 1998, it is thus implied that the defendant is allowed continued usage of the overdraft facility until the expiration date, namely 30 June 1998. In the circumstances, the plaintiff is justified in charging commitment fee for any undrawn portion of the overdraft limit during the continuing period of the overdraft facility. Further, this was what the plaintiff and the defendant had agreed to as evidenced by plaintiff's letters of offer, exhibited as exh CYK–2 of encl 3. Thus the defendant is now estopped from challenging the plaintiff's right in charging commitment fee during the duration of the overdraft facility.

As regards the learned counsel of the defendant's argument that it is plausible that the plaintiff had tried to minimise their exposure by not allowing further drawdown. I find that that the same are mere conjectures which are devoid of any substance. The defendant has not exhibited any evidence to show that the plaintiff had actually refused to allow drawdown as suggested by the defendant in their affidavits.

Based on the above premise, it is my view that the defendant aforesaid contention does not amount to a triable issue.

Shares accepted as security but later rejected

The defendant further contended that a list of shares totaling some 300 over lots were accepted by the plaintiff as security. Suddenly, without giving valid reasons the defendant alleged that the said shares were rejected by the plaintiff in April 1998. I find that the above issue is a non starter. Although

A the plaintiff did at one point of time make known to the defendant that they wish to reject certain shares previously pledged and accepted as security, but the end result is that these shares in contention were later sold. Further, proceeds of the sale of these shares were also utilised to reduce the outstanding sum under the overdraft facility.

B It is my view that the defendant cannot have the best of two worlds, namely to state that the plaintiff is not entitled to reject the shares previously accepted and also contend that the plaintiff does not have the power to sell such 'rejected shares'. The shares in contention were previously pledged by the defendant and by virtue of the provisions contained in MOD, exhibited as exh CYK–4 of encl 3, the plaintiff is entitle to dispose of same for the C purpose of applying the proceeds, deriving from such sale, to reduce any outstanding sum under the overdraft facility. As such, whether or not the defendant's contention about the rejection of shares is of any merit, it was both the intention of the defendant and the plaintiff, at the time of execution of the said MOD, that the plaintiff is at liberty to dispose/sell the same. Thus, it cannot be true that the plaintiff did not have the right to sell the D said shares and to apply the proceeds towards reduction of the outstanding under the overdraft facility. In the circumstances, I hold the view that contrary the contention of the defendant this is also not a triable issue.

In the final analysis it is my considered view that the defendant has not raised any triable issues, which would justify the reversal of the learned E SAR's decision. In the circumstances, I hereby dismiss the defendant's appeal with costs.

Appeal dismissed.

Reported by Lim Lee Na

F

G

H

I